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Supreme Court of the United States

October Term, 1932.

No. 526.

THE BALTIMORE & OHIO RAILROAD COMPANY, A CORPORATION, AND WESTERN MARYLAND RAILWAY COMPANY, A CORPORATION, *Petitioners*,

v.

A. SPATES BRADY, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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THE J. W. STOWELL PRINTING COMPANY, FREDERALSBURG, MD.

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v.

A. SPATES BRADY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

May it please the Court:

The unanimous opinion of the Circuit Court of Appeals in this case (written by Judge Parker and concurred in by Judges Northcott and Soper) is such an excellent statement of the questions involved and of the law applicable thereto that respondent adopts it as his main brief in opposition to the petition for certiorari filed herein. The opinion also contains a comprehensive statement of the facts which respondent refers to and adopts as his statement deemed necessary to correct inaccuracies and omissions in petitioners' statement. But nothing stated in or deducible from the opinion plus this adoption is to be taken as an admission that respondent

ever received or rejected a 20-80 offer tendered or concurred in by both railroads, or that the Coal Company was actually restricted to that basis in *receiving* cars.

The following argument will be confined for the most part to running comments on petitioners' contentions.

Summary of the Argument

I.

Respondent's Right of Action and the District Court's Jurisdiction were not limited in maximum amount to the sum awarded by the Commission's reparation order with interest, and the District Court could grant recovery of a larger amount.

1. This Court has sustained a greater recovery than the Commission's award (correctly computed) in one case, and has clearly intimated in other cases that a District Court has jurisdiction so to do in a Section 16 suit.

2. The decision of the Circuit Court of Appeals for the Fourth Circuit herein is not in conflict with those of the Circuit Courts of Appeals for the Ninth and Third Circuits in any way constituting a ground for certiorari. The expressions in the opinions of the latter courts were clearly *obiter dicta.*

3. Section 16 of the Act specifically provides that the suit on a reparation order *shall* proceed in *all* respects *like other civil suits for damages* with two, and only two, exceptions, neither of which limits recovery to the Commission's award; and the Courts are not at liberty to ingraft any additional exceptions.

4. The Circuit Court of Appeals' interpretation of Section 16 herein is entirely consistent with the fundamental principles of equality and uniformity which underlie the whole statute. A contrary interpretation would produce inequality, inconsistency and discrimination.

II.

The sufficiency of the petition to support the judgment is not open to attack by petitioners on the ground set forth in their brief, pp. 20-21, 35-41.

The petition complied with the statute, sued for a greater amount than the judgment, and nothing in the petition required any deduction from the amount sued for.

The action of the Commission in applying the mitigation-of-loss rule was beyond its powers, erroneous as a matter of law, and void.

1. Petitioners, having failed in their demurrers to raise any question regarding the sufficiency of the petition, are estopped from raising such a question after judgment.

2. In setting forth the causes for which respondent claimed damages and the order (including the reports made parts thereof) of the Commission in the premises, the petition complied with a requirement of the statute. But it did not thereby adopt the quoted findings or attached reports, or incorporate them for the purpose of cutting down the amount sued for.

3. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals therein are true and correct.

4. The petition put the railroads upon notice that respondent intended to attack the prima facie correctness of the Commission's findings as to the amount of his damages and to present additional evidence in support of his claim at the trial.

5. The verdict and judgment were for an amount considerably less than the amount sued for. There being no bill of exceptions in the record, it must be assumed that "the case was fairly and fully submitted in the charge of the judge to the jury" and that there was "testimony tending to show damages in at least the sum" awarded by the court.

6. While the same rules of law prevail in both Section 9 methods of procedure, the Commission has no more authority to pass upon the "reasonableness" of a shipper's acts as a basis for applying the mitigation-of-loss rule than has a District Court to pass upon the reasonableness of a carrier's practices as a basis for assessing an injured shipper's damages. The Commission's action in applying the mitigation-of-loss rule was beyond its powers.

7. The Commission's action in respect to the socalled 20-80 offer (assuming respondent received it and that it was concurred in by both roads) constituted a misapplication of the mitigation-of-loss rule and was erroneous as a matter of law in numerous respects, towit: (a) the offer was arbitrary, without regard to respondent's business and unlawful, hence respondent was not bound to accept it; (b) it was equally within the power of the railroads to make effective the expedient which the Commission found respondent should have adopted; (c) respondent did all the rule required by ordering cars from both roads and accepting all cars furnished by both roads; (d) respondent's acceptance of the offer would have worked an estoppel against him; (e) as there were no Western Maryland rates in effect from respondent's mine, that road having refused to publish them, respondent was not required to accept any 20-80 offer unless and until such rates were published; and (f) as the railroads' refusal to accord respondent his rights in the premises was not accidental, unforeseen or mere negligence on their part, but a continuous tort and violation of statutory duty, the mitigation-of-loss rule was not applicable in any event.

III

The assailed acts and practices of the railroads presented questions administrative in character, consequently the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining any action for damages.

The petition shows that the Commission decided these questions and prescribed the standard. Its action thereon is conclusive.

The promulgation of the Commission's finding and standard was delayed beyond the two-year period of limitation, thus making impossible any voluntary election of Section 9 remedies. Respondent was compelled to proceed before the Commission or not at all. A construction of Section 16 that in such cases the injured shipper is limited in maximum recovery to the Commission's award would be unjust and deprive the shipper of his statutory and property rights.

1. The basic question before the Commission was one of mine classification for purposes of car distribution and was within the exclusive jurisdiction of the Commission. Respondent was therefore compelled to resort to that tribunal in the first instance.

2. It was not necessary for the petition to state "how or why the Commission reached its conclusion" that the acts and practices of the railroads were unduly prejudicial. "This Court has no concern with the correctness of the Commission's reasoning" with respect to matters within its administrative jurisdiction.

3. The Commission decided that the railroads should have accorded respondent the rights and privileges of a two-railroad or "joint" mine. The fact that the Commission decided the administrative question one way rather than another, or prescribed one standard rather than another, does not render the question presented any the less administrative.

4. The Commission's finding of undue prejudice and its prescribed standard of service that should have prevailed at respondent's mine are conclusive on the courts.

5. Respondent, compelled to proceed before the Commission, proceeded as the statute provides, secured a reparation order which petitioner's elected to refuse to pay, and then filed suit thereon and secured judgment for an amount which, although greater than the Commission's

award, was much less than that body's computation of his damages. To hold now, by a strained construction of Section 16, that in such cases the maximum permissible recovery is the Commission's award would be flagrantly unjust. The Court has held that it is bound to give heed to the rule that where a particular construction of a statute will occasion injustice, it is to be avoided if another and more reasonable interpretation is present in the statute. By the plain language of Section 16, the more reasonable interpretation of the Circuit Court of Appeals is abundantly present in this statute.

IV

The questions whether Respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v Interstate Commerce Commission, 43 Fed.(2) 847, affirmed Brady v United States, 283 U. S. 804.

1. Every element necessary to and justifying the application of *res judicata* is present in this case.

2. The question of irreparable injury was a distinct issue in the equity proceeding, and the special court's decision that it was without jurisdiction "for the reasons stated", one of which was that no irreparable injury is to be apprehended from reparation orders and that errors therein may be corrected in the Section 16 suit, was addressed to that issue, and was not *obiter dicta*.

3. The fact that, insofar as the present record shows, *res judicata* was not pleaded is immaterial. The two actions were carried on simultaneously in the same District Court.

4. The memorandum opinion of this Court affirmed the decree of the special court and thereby sanctioned the result and effect of that court's determination of the foregoing questions upon the present case, even though the citations appended to the opinion may indicate that

this Court travelled a different route part of the way in reaching the common goal.

5. Even though the special court's determination of the foregoing questions was reached upon an erroneous view of the law or by an erroneous application of the law, nevertheless it may not be disputed in the instant case.

ARGUMENT

I

Respondent's right of action and the District Court's jurisdiction were NOT limited in maximum amount to the sum awarded by the Interstate Commerce Commission's reparation order with interest, and the District Court COULD grant recovery of a greater amount.

1. While this Court has never directly and specifically decided the precise question as above stated, it has sustained a greater recovery than the Commission's award correctly computed. *Pennsylvania R. Co. v. Weber,* 257 U. S. 85, 91 (in connection with *Same v W. F. Jacoby Co. v P. R. Co.,* 242 U. S. 88, 91). In the latter case, the plaintiff sued for, and recovered, the amount of the Commission's award with interest. Upon appeal this court was convinced ("almost mathematically certain") that the Commission had used a wrong basis in calculating the amount of its award; the award would have been automatically smaller if the correct formula had been applied to the basic figures from which the award was computed. 242 U. S. at pp. 94-7. For the trial court's refusal to charge the jury in respect to the matter, the judgment was reversed and the case remanded. At the new trial, the plaintiff introduced the record before the Commission and a great deal of other evidence, and again verdict and judgment were for the amount of the Commission's award with interest. 263 Fed. 945, 946, 948; affirmed 269 Fed. 111, 114. The case was again brought to this Court (*Weber Case, supra*) where the judgment was affirmed notwithstanding the "inescapable conclu-

sion" that the commission had used a wrong basis in arriving at the amount of its award. *This is a clear case where the recovery permitted was greater than the Commission's award would have been if computed on the correct basis. It is a clear case where the amount sued for was greater than the Commission's award correctly computed,* and this Court's affirmance of the judgment for the greater amount is therefore a persuasive precedent for the Circuit Court of Appeals' conclusion on that question here.

In at least three other cases, this Court has clearly intimated that a District Court has jurisdiction to give a greater recovery than the Commission's award. *Pennsylvania R. Co., v Clark Bros. C. M. Co.,* 238 U. S. 456, 472-3; *Louisville & N. R. Co. v Ohio Valley Tie Co.,* 242 U. S. 288, 291; *Meeker & Co. v L. V. R. R. Co.,* 236 U. S. 412, 430. In the first of these cases, the plaintiff went into a state court while its claim was still pending before the Commission and secured judgment for $41,181 trebled, or a total of $124,443. Shortly thereafter, the Commission promulgated its report and, out of a claim for $36,401.12, awarded only $31,127.96. See 23 I. C. C. p. 191. This report was brought to the attention of this Court (p. 463), and the quite large discrepancy between the claim, judgment and award should be borne in mind in considering this significant excerpt from the opinion—

> In the situation in which the plaintiff stood after the Commission's finding, that *statute* determined the *extent* of the damages it was entitled to recover with respect to interstate sales and shipments, * * * *This is not to say that the finding of the Commission as to the amount of the damages has any other effect than that prescribed in Section 16 of the Act.* (See note)*

*Unless otherwise stated, these and other italics in the brief have been supplied.

In the *Ohio Valley Tie Case, supra,* the plaintiff secured an order from the Commission for $6,198 as reparation for unreasonable rates, and then instituted suit and secured judgment in a state court for over $50,000 for general damages arising out of the same transactions but not, as alleged, included in the Commission's award. Payment of the order had been offered to and accepted by the plaintiff, consequently this Court held that all damages attributable to the overcharges (unreasonable rates) "must be taken to have been considered in the award of the Commission and compensated when that award was paid", and reversed the judgment. Of course when a reparation order is complied with and payment accepted, as when the judgment order of a court is satisfied and payment acknowledged, no further proceeding in respect to the transactions covered by it may be maintained in any tribunal. But the true significance of the opinion insofar as the instant case is concerned lies in the fact that this Court, after pointing out that Section 16 provides that if the carrier does not comply with a reparation order in due time the complainant may sue in a state court, then indicated that the trial court would not be limited by the amount of the Commission's award. It said—

> The decisions say that *whatever the damages were they could be recovered* (citing cases); and that the statute determines the extent of damages (citing the *Clark Bros. Case, supra*).

The citation of the *Clark Bros. Case* in support of the holding that the statute determines the *extent* of the damages recoverable in a Section 16 suit is particularly significant, for there this Court followed a similar holding with the observation that the reparation order pursuant to which the suit is instituted has only the quality of *prima facie* evidence.

2. Petitioners contend (brief p. 19, 27) that the decision of the Circuit Court of Appeals for the Fourth Cir-

cuit is in conflict with decisions of the Circuit Courts of Appeals for the Ninth and Third Circuits. The cases cited are *Chicago, B. & Q. R. Co., v Fentuch,* 191 Fed. 482, 486, and *Western N. Y. & P. R. Co., v Penn Ref. Co.,* 137 Fed. 343, 363. There are expressions in these opinions to the effect that the maximum limit of recovery in a Section 16 suit is the amount of the Commission's award with interest, but in both of them the Commission's award with interest was the amount sued for, hence the expressions referred to were *obiter dicta,* and constitute no basis for granting certiorari herein. *Fentuch Case,* p. 483; *Penn Ref. Case,* p. 347.

Nor is there any conflict between the decision of the Circuit Court of Appeals in this case and those of the other Federal Courts in the cases cited on page 33 and elsewhere of petitioner's brief. In each and all of those cases (except *Powers v Cady,* 9 Fed. (2) 458, wherein no order of the Commission was involved), including *Standard Oil Co. v United States,* 283 U. S. 235, 240, the plaintiffs asked the courts to which they resorted after the Commission had denied them relief to substitute their judgment for that of the Commission upon purely administrative questions of fact committed by law to the exclusive jurisdiction of the Commission. On the other hand, the respondent here made no attack upon the Commission's finding of undue prejudice or upon the standard of service which it found should have prevailed; he did not ask the District Court to exercise any administrative authority whatsoever.

Nor can petitioners get any comfort out of the alleged "implication" in the short excerpts from the opinions of this Court in the cases cited on pages 31-2 of their brief. The reason why this Court referred to the prima facie clause in Section 16 as "cutting off no *defense*", leaving every opportunity "to the *defendant* to contest the claim", and being "open to contradiction by the *carrier*", etc., is obvious. The Court was there passing upon contentions of carriers; it made specific reference to "carriers" and "defendants" merely to emphasize its conclusion that the contentions which they were addressing to the Court were without merit.

3. Petitioners contend (brief p. 28) that "by the plain language of Section 16 suit can be brought by the shipper only if the carrier refuses to pay". By like "plain language" he may recover the FULL amount of his damages, whether more or less than the Commission's computation thereof, if the carrier *does* refused to pay. And petitioners refused to pay in this case. If Congress had intended to limit recovery to the Commission's award, its intention so to do would not have been left to inference and speculation, but would have been clearly expressed. It certainly would not have provided that the suit *shall* proceed in *all* respects *like other civil suits for damages,* if it had intended to limit recovery to the Commission's award. It certainly would not have limited its sole exceptions to this general language to two, towit, (a) that the findings and order of the Commission shall be prima facie evidence only and (b) that the plaintiff shall be relieved of court costs, etc., if it had intended to add a third exception, towit, (c) that the maximum permissible recovery shall be the amount of the Commission's award. When an exception is incorporated in a statute, it excludes all others than the one expressed, and the courts are not at liberty to ingraft other exceptions. *Expressio unius est exclusio alterius. Kendall v. United States,* 107 U. S. 123; *Ford v. United States,* 273 U. S. 593, 611.

The language of the statute defining the shipper's rights if the carrier refuses to pay is clear and plain, hence the well established rule that the language *must* be taken as the final expression of the legislative intent is applicable. *Caminetti v United States,* 242 U. S. 470, 485; *Hamilton v Rathbone,* 175 U. S. 414, 419; *United States v Missouri P. R. Co.,* 278 U. S. 269, 278. In the last cited case, wherein an order of the Commission based upon an erroneous construction of the Act was involved, this Court said—

> We are therefore bound by the words employed and are not at liberty to conjure up conditions in order that resort may be had to construction. It is ele-

mentary that where no ambiguity exists, there is no room for construction.

Even if there were room for construction, this Court would be faced with the fact that the Act is a remedial statute and should therefore be broadly construed. *New York, N. H. & H. R. Co. v Interstate Commerce Commission,* 200 U. S. 361, 371. This is equally true of its reparations provisions. "The provisions of the Act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through violation of public duty by the carrier, must receive a liberal and not a narrow interpretation". A claim for damages under the Act is a "claim not for a penalty but for compensation, (and) is a property right." *Spiller v Atchison, T. & S. F. R. Co.,* 252 U. S. 117, 135.

4. Petitioners contend (brief p. 34) that to subject the carrier refusing to pay a reparation order to the risk of being compelled to pay a larger amount "would permit the discrimination which the whole Act intends to prevent, by discarding the limit in favor of the shipper who sues and insisting on it by payment to the others." But the same result may be accomplished by paying the order in favor of one shipper and successfully resisting it in favor of a competitor; or of putting up a stronger defense against one shipper than against his competitor in the same or a different suit; or of satisfying the claim of one shipper before hearing and successfully resisting his competitor's Section 16 suit on a reparation order.

The Circuit Court of Appeals' view of this jurisdictional question is entirely consistent with the principles of equality and uniformity which underlie the statute. By giving the injured shipper the right to pursue only one of two exclusive remedies for violations of the Act which require the administrative ruling of the Commission to determine them, Congress certainly intended that each of the two was to comprehend whatever measures are necessary to secure recovery of the statutory standard of full compensation vouchsafed in Section 8, and

further that each was to be as adequate and complete as the other. This is so because the principles of equality and uniformity permeate Section 9 no less than the other provisions. Pursuant to this view, this Court has literally read into the Act that whether complaint is filed with the Commission or suit is brought in court, the same period of limitation applies (*A. J. Phillips Co. v Grand Trunk R. Co.*, 236 U. S. 662, 667), and the same starting basis, a finding by the Commission on the administrative question, is required (*Mitchell Coal & C. Co., v P. R. Co.*, 230 U. S. 247, 258).

But if both methods of procedure are to be controlled by the same rules of law and hence to culminate in like final results, they must be construed as subject also to the same judicial machinery for correcting errors and mistakes. Having erected a guide post directing shippers to use either of two Federal-aid highways to reach a common goal, Congress certainly did not intend to leave one of them without a bridge over the "river of errors and mistakes". Therefore, the Section 16 suit pursuant to a reparation order must be regarded as merely a *de novo* step in the Section 9 "method of procedure" before the Commission and as part and parcel of that particular "remedy"; and must be construed to furnish means for correcting the errors of that body as effectively as do the appeal and new trial in the District Court for correcting the errors of that alternative tribunal. If two competing shippers, having secured the same finding of the Commission on the administrative question, seek recovery of damages, one by an action in the Federal Court and the other by complaint to the Commission, the fundamental principles of equality and uniformity which this Court has repeatedly held underlie the whole statute require that the errors of the two trial tribunals shall be corrected by the same judicial machinery.

It is true that Section 16 does not expressly provide that suit may be instituted in court where the injured shipper is dissatisfied with the Commission's order as well where the carrier refuses to comply with it. But neither does that section expressly provide that the two-year period of limitation referred to therein shall apply to initial actions for damages in the courts. Nor does

Section 9 expressly require an administrative finding by the Commission as a condition to pursuing the remedy in a Federal Court. These things are only implied. As before indicated, they have been read into the statute in order to make it a consistent whole and to insure equality and uniformity. "In other words, the Act cannot be held to destroy itself." *Texas & P. R. Co. v Abilene Cotton Oil Co.*, 204 U. S. 426, 436-7, 441-2. If not, then the Circuit Court of Appeals' opinion herein as to the scope of the Section 16 suit must be upheld. The same fundamental reasons call for the corrective aid of the courts to perfect the method of procedure before the Commission as for the preliminary administrative power of the Commission to initiate the alternative method of procedure in a Federal Court.

II.

1. The sufficiency of the petition to support the judgment is not open to attack by petitioners on the ground presented on pages 20-21, 35-41, of their brief.

2. The petition complied with the statute, sued for a greater amount than the judgment, and nothing contained in the petition required any deductions from the amount sued for.

3. The Commission's application of the mitigation-of-loss rule was beyond its powers, erroneous as a matter of law, and void.

1. The petition prayed judgment for the full amount of respondent's damages, or for a greater amount than the judgment and a greater amount than the Commission's award with interest. The West Virginia Code, 1931 (Chap. 56, Art. 4, Sec. 36)—provides that—

> "All demurrers in civil cases shall be in writing and shall state specifically the grounds of demurrer relied on, and no grounds shall be considered than those so stated, except by the court of its own accord, but the demurrant may, by leave of court, amend his demurrer by stating additional grounds, or otherwise, at any time before the trial at law or final hearing in equity".

Furthermore, it had been held as long ago as 1899 by the supreme court of that state that "a pleading when presented is presumed to be sufficient and it is the duty of a demurrant if he thinks it insufficient and desires to take advantage of it, at least to call the attention of the court to the defects or imperfections in such pleading". *Koontz v. Koontz,* 47 W. Va. 31, 34; 34 S. E. 752.

The only grounds "specifically" stated in petitioners' demurrers in this case were that the demand or claim asserted in the petition was for an amount largely in excess of the Commission's award and that the plaintiff (respondent here) "had no right of action to cause the court, and the court no jurisdiction, to consider, review, revise or reverse" the Commission's award (33-4).* These grounds challenged the jurisdiction of the court, not the sufficiency of the petition. They contain no reference to the objection presented on pages 20-21, 35-41, of petitioners brief herein, to wit, that the petition, while in form praying recovery of a greater amount than the Commission's award and one sufficient to cover the judgment, in substance and effect shows that respondent suffered damages only to the extent of the Commission's award with interest. As petitioners did not raise this objection before the trial, they are estopped from raising it after judgment. Their failure to raise it *specifically* in their demurrers was tantamount to a waiver of the point.

2. In setting forth the causes for which respondent claimed damages and the order of the Commission in the premises (including the reports made parts of the order, rec. 31), the petition complied with a requirement of the statute. Section 16; *Vicksburg, Shreveport & P. R. Co. v. Anderson-Tully Co.,* 256 U. S. 408, 415. In quoting the mitigation-of-loss and average loading findings and challenging their correctness, the petition put the railroads upon notice that respondent intended to attack their

*Unless otherwise specified, figures in parentheses refer to pages of the printed record.

prima facie validity and to present additional evidence in support of his claim at the trial. The petition did not adopt the quoted findings and attached reports in any respect whatsoever; it did not incorporate them in the petition for the purpose of cutting down the amount sued for. The annexation of an exhibit to a pleading does not amount to an allegation that the statements and recitals contained therein are true and correct. *Sweeney v Johnson*, 130 Pac. 997, 998. In *Lockhart v Leeds*, 195 U. S. 427, 434, it was said—

> "We entirely agree with the court below that the facts constituting the cause of action * * * must be distinctly alleged, so that the defendant may know what he has to meet, and so that he may, if he chooses, put them in the issue. The rule must receive a reasonable interpretation, and must be so enforced as to further, and not obstruct, the administration of justice."

See also *Swift & Co. v United States*, 196 U. S. 375, 390.

(a) The petition prayed judgment for $57,735.11 with interest from April 1, 1923, or a total of about $85,602.00 to the date of the judgment order; the judgment was for $63,048.60 with interest, or a total of about $63,363.00 to the date of the judgment order. There is nothing in the petition which required any deductions from the amount sued for.

Petitioners contend (brief p. 36) that the petition did not attack the assailed findings "on the ground that they were not established facts". It attacked them on the ground, among others, that they were void and this Court has held that a finding "contrary to the indisputable character of the evidence" is void. *Interstate Com. v. Louisville & N. R. Co.*, 227 U. S. 88, 91-92. The mitigation-of-loss finding quoted and attacked in the petition shows that the socalled "20-80 offer" was the basis for the finding (7), but the petition also shows that respondent placed written orders for cars with the West-

ern Maryland which that road refused to honor on any basis (4), and thereby shows that although these orders were the legal equivalents of tenders of freight (*Rules Governing Ratings of Coal Mines*, 95 I. C. C. 309, 311), the Western Maryland made no "offer" to transport the freight by placing cars for loading at respondent's mine. The petition further shows that the Western Maryland rate schedules did not cover respondent's mine (3), and thereby shows that that road refused to put itself in a position to make or join in a legal "offer" of transportation and cars, 20-80 or otherwise, to respondent. Sections 6 (7) and 1 (3) of the Act.*

Furthermore, the average loading finding quoted and attacked in the petition shows that 50 tons was used in the rules in determining the daily *rating* of a mine expressed in cars and in those governing the *distribution* of cars to coal mines (7), but neither the petition proper nor any Commission finding quoted or referred to therein shows that after the cars were distributed any rules whatsoever provided that 50 tons per car was the maximum *loading* permitted therein. Indeed, the petition proper shows that petitioners themselves urged respondent to load all cars received "as heavily as possible", the period involved having been one of coal-car shortage, and that pursuant thereto respondent loaded the cars he received to an average of 53.55 tons per 50-ton car (5).

(b) Now taking the Commission's reports attached as exhibits as incorporated in the petition, Exhibit A states that "defendants *contend(ed)* that complainant was offered the same arrangement but he declined and cannot therefore be heard to complain", and that "whether or not this is true and whether or not similar service was in fact offered complainant depends upon surrounding circumstances" (15). Among other "surrounding circumstances" appearing on the face of the report are that

*These sections provide that no carrier may engage in transportation unless and until it has schedules of rates on file, and "transportation" includes the furnishing of cars.

the trackage agreement covered the Coal Company mines only (12-13); that in the *latter* part of October, 1922, (the period involved began October 14, 1922), respondent applied to the president of the Western Maryland for service via that road and his application was denied (17); that the paper 20-80 offer came from the Baltimore & Ohio, not both roads (18 bottom of page); and that the ultimate finding and conclusion of the Commission was that "the acts and practices of defendants whereby they accorded Maryland (Western Maryland) service to the mines of the West Virginia Coal & Coke Company * * * *while failing to accord similar service to complainant's mine* located intermediate thereto resulted in undue prejudice to complainant" (20).

Exhibit B states that at the hearing on the amount of damages a witness for respondent denied that his mine was offered the 20-80 basis, and while it further states that the contrary is shown by testimony of the same witness at the first hearing, "questions with regard thereto were thus raised to be passed upon by the jury in the light of the evidence" (97).

This exhibit B further shows that respondent accepted and loaded all cars furnished by both railroads and hence shows that he accepted each and every real offer of transportation made by either or both railroads (24).

(c) Petitioners contend (brief p. 37) that "the verdict and judgment could not have been arrived at without inclusion of at least the greater part of the damages which could have been avoided by acceptance of the offered car supply; and that therefore the petition does not support the judgment and the judgment is erroneous". But they point to no allegation in the petition proper or finding in the Commission's reports attached thereto that respondent ever rejected any "offered CAR SUPPLY" whatsoever. On the contrary, the petition proper shows that respondent accepted and loaded all the cars he received from both railroads (5); the Commission's report attached as Exhibit B to the petition shows that respondent accepted and loaded all cars furnished to him by both railroads (24); and the Circuit Court of

Appeals found that "he accepted all cars tendered him by both railroads" (98).

Petitioners point (brief pp. 37-9) to delimited portions of the opinions in *Pennsylvania R. Co. v. Jacoby*, 242 U. S. 89, 99, and (second appeal) *Same v Weber*, 257 U. S. 85, 86, 91, and argue therefrom that the amount of the verdict and judgment in the instant case was "unattainable except by inclusion of the amount which the Commission had disallowed as resulting from refusal to accept the offered car supply", and that this "renders the conclusion inescapable that the judgment included this amount". This was the case where the recovery permitted was greater than the Commission's award if correctly computed. The judgment was affirmed because it was supported by other evidence than the Commission's award, this Court saying (257 U. S. at p. 91):—

> "Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of the award."

The record in the instant case contains no bill of exceptions, a fact for which petitioners themselves are responsible. *Brady v Baltimore & O. R. Co.*, 56 Fed. (2) 231, 234. Accordingly, it must be assumed here that the trial proceeded in all respects as the statute requires, that the trial judge correctly determined all questions presented to him, that he properly charged the jury, that the verdict was fully justified by the evidence, and that the trial judge was justified in using the verdict as the basis for the judgment. In other words, it must be assumed here that "the case was fairly and fully submitted * * * in the charge of the judge to the jury", and that there was "testimony tending to show damages in at least the

sum" awarded by the jury, which was considerably less than the amount sued for *and also considerably less than the Commission's computation of respondent's damages plus interest.*

3. At this point, it will be assumed (but not conceded) that the reports were incorporated in the petition for all purposes, that respondent actually received and rejected the "20-80 offer", and that it was concurred in by both roads. Respondent contends that the Commission's quasi-judicial action in applying the mitigation-of-loss rule was (a) beyond its powers and (b) erroneous as a matter of law.

(a) As a basis for applying that rule, the Commission undertook to regulate respondent's private business, to pass judgment upon his conduct in respect to the 20-80 offer, and to determine whether his rejection of the offer was "reasonable" (7, 28-9). The Commission has no such power. It is a body of limited jurisdiction charged with the enforcement of a statute which applies to carriers, not shippers. The Act sets up numerous standards for the operations of carriers—their acts and practices must be reasonable and not unduly discriminatory; it sets up no standards whatsoever for the acts and practices of shippers. The Commission has no common law or equity jurisdiction, and no power to enforce rules of standards not found in the Act. As said by the Commission itself in a leading case *(State of New York v N. Y. C. R. R. Co.,* 95 I. C. C. 119, 141)—

> "Our jurisdiction differs in two important respects from that of the courts. It is purely statutory, *and it is unilateral.* Parties are not before us on equal terms. We may entertain complaints by shippers against carriers, but not by carriers against shippers. We may not consider cross-complaints or counter claims, or setoffs, by defendant carriers against complaining shippers."

This is the first and only case in all the 45 years' history of the Commission that it has applied the mitigation-of-loss rule.

Consider the question from another standpoint. While acting in its administrative capacity, the Commission held that the acts and practices of petitioners were in violation of the Act and laid down the lawful standard that should have prevailed, towit, that respondent—

> "should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 percent of the rating of his mine as his judgment dictated, and cars should have been accordingly furnished in conformity with the supply of cars on the respective roads."

Pursuant to the further hearing granted for the sole purpose, not of reconsidering, revising or amending this standard, but of determining the amount of respondent's damages based upon that standard (20, 6), the Commission now acting in its quasi-judicial capacity proceeded to make a retroactive application of the very acts and practices which, in its administrative capacity, it had found unlawful. In its administrative capacity, it held that carriers may not by withholding their equipment and facilities dictate or control the markets which a particular shipper may seek or enjoy (19); but in its quasi-judicial capacity, it held that they may do so to the extent contemplated by the 20-80 offer. In its administrative capacity it held that respondent should have been permitted to divide his cars and shipments as his judgment dictated (20); but in its quasi-judicial capacity, it held that he should have submitted to the arbitrary dictation of the railroads. In its administrative capacity it held that the 20-80 offer was arbitrary, not on a basis of equality between shippers, and unlawful (18, 20); in its quasi-judicial capacity, it resorted to it as a basis for applying the mitigation-of-loss rule. Its quasi-judicial action was wholly inconsistent and incompatible with

its previously-prescribed administrative standard and tantamount to a violation of that standard.

Once the Commission finds a rate, rule, regulation or practice in violation of the Act and fixes the lawful standard, that standard is conclusive whether it relates to the past, present or future. It is the same as though the standard had been incorporated in the statute; having been fixed pursuant thereto, it is to all intents and purposes a part of it and therefore binding upon the carriers and also the Commission. *Mitchell Coal & C. Co. v. P. R. Co.*, 230 U. S. 247, 258; *Arizona Grocery Co. v Atchison, R. & S. F. R. Co.*, 284 U. S. 370, 389.

But petitioners argue (brief, pp. 21, 39) that the measure of damages in a reparation proceeding in a court and before the Commission are the same and, as a court may apply the mitigation-of-loss rule, so may the Commission. In support of this contention, they refer to *Louisville & N. R. Co. v Ohio Valley Tie Co.*, 242 U. S. 288, 290, and quote therefrom partly as follows —

> "By section 9 any person so injured may make complaint to the Commission or may sue in a court of the United States to recover the damages for which the carrier is liable under the Act, but must elect in each case which of the two methods of procedure he will adopt. The rule of damages in one hardly can be different from that proper for the other."

Observe that the Court held that the rule of damages in one *method of procedure* hardly can be different from that proper for the other *method of procedure*. The Section 16 suit pursuant to a reparation order is a step in and part of the "method of procedure" before the Commission referred to in Section 9. The recoverable measure of damages in this combination method of procedure is the same as that in the alternative District Court method, but this does not mean that each of the two parts of the combination method does not have its own peculiar function. The function of the Commission

part is to determine "the FULL (not the NET) amount of damages sustained in consequence of any such violation of the provisions of this Act" (Section 8), and leave to the Section 16 part the determination of any off-setting amount resulting from the shipper's failure to comply with the rules or standards outside the Act.

There is a precedent for the foregoing concept of the Commission method of procedure. Section 9 provides for two alternative methods for the recovery of damages, one of which is by suit in a District Court, but this Court has held that with respect to what may be termed administrative causes of action no court has jurisdiction of a suit against an interstate carrier for damages resulting therefrom until the Commission has first declared the rates, rules or practices complained of to have been in violation of the Act. *Abilene Cotton Oil Co. v T. & P. Ry. Co.*, 204 U. S. 426, 436; *Mitchell Coal & C. Co. v P. R. Co.*, 230 U. S. 247, 257. It follows that with respect to such causes of action the District Court method of procedure also consists of two parts, each with its special function to perform. *The Commission has no more authority to pass upon the "reasonableness" of a shipper's acts and practices as a basis for applying the mitigation-of-loss rule or any other standard outside the Act, than has a District Court to pass upon the "reasonableness" of a carrier's acts and practices or any other standard within the Act as a basis for assessing an injured shipper's damages.*

(b) The Commission's quasi-judicial action in respect to the 20-80 offer constituted a misapplication of the mitigation-of-loss rule and was erroneous as a matter of law.

In the first place, while a party suffering loss from breach of duty ought to do what a reasonable man would do to mitigate his loss, "the duty of the injured party is limited by the rules of common sense and fair dealing; he is not required to take such action as might under the circumstances be imprudent and impracticable." 17 *Corpus Juris* 767-770). "The amount of care required is

not to be measured by *ex post facto* wisdom, he is not bound at his peril to know the best thing to do." *Sedgwick on Damages* (9th Ed.) Sec. 221. Here, the Commission's report (Exhibit B) shows on its face that respondent sold his coal on the open market; he did not know more than a day in advance where his coal was going (16, 18-19). Indeed, the Commission specifically found that the 20-80 offer was arbitrary and without regard for the requirements of respondent's business (20). In such circumstances, no prudent shipper would have submitted to the conditions fixed by the railroads after conference with the shipper's competitor, and agreed to order his cars day after day, regardless of market or car supply conditions, on a fixed and unchangeable percentage basis. Assuming that the Western Maryland car supply and markets were better than the Baltimore & Ohio car supply and markets when respondent received this 20-80 "offer", there could be no assurance *at that time* that such would continue to be the fact for an indefinite time in the future. Respondent's rejection of the offer was therefore entirely reasonable, while that which was demanded of him was unreasonable and unjust. *Tubular Rivet & Stud Co. v Exeter Boot & Shoe Co.*, 159 Fed. (C. C. A.) 824, 830-1; *Northern Colorado Irr. Co. v Pouppert*, 127 Pac. 125, 128.

Next, the Commission's report (Exhibit B) shows that respondent filed written orders for his rating of cars with both railroads (22). There was nothing to prevent them from complying with these orders on the 20-80 basis. It was within their power to make effective the very expedient which the Commission found respondent should have adopted. Where he whose duty it is primarily to fulfill a contract and to prevent damages which may result from a failure has equal opportunity to fulfill the obligation, he alone may be depended upon to perform the duty, and it will not avail him to say the injured party might have performed the duty for him and thus lessened the damages. 17 *Corpus Juris* 774.

Next, the Commission's report (Exhibit B) shows that respondent did all that the mitigation-of-loss rule required of him; he ordered a 100 percent supply of cars from the Western Maryland, but since that carrier would not honor his requisitions he also placed his orders with the Baltimore & Ohio (22), *and further that he accepted and loaded all CARS actually furnished him by both railroads* (24).

Next, respondent contends that the plaintiff in an action for damages is under no obligation to accept a method of reducing his loss which might be construed as an abandonment of his claim or be likely to work an estoppel against him. *Campfield v Sauer*, 189 Fed. 576, 579; *Everett v Emmons Coal Mining Co.*, 289 Fed. (C. C. A. 4) 686, 691. If respondent had acceded to the so-called 20-80 offer and then appealed to the Commission for relief, that body would very likely have dismissed his complaint on the ground that no violation of the Act had been shown. See *Reeves Coal Co. v Chicago, M. & St. P. R. Co.*, 37 I. C. C. 707, 708.

Next, respondent contends that as there were no Western Maryland rate schedules in effect from his mine, that road having refused to publish and file them, he was required by no rule of law to accept a so-called offer which compelled him to sell 80 percent of his output for delivery via that road, and the Commission was wholly unjustified in using the rejection of such an offer as a basis for applying the mitigation-of-loss rule. Furthermore, the 20-80 offer itself, not having the backing of duly-published rates or the authority of applicable rules, was illegal and void.

Lastly, respondent shows that petitioners' persistent refusal to accord respondent's mine a two-railroad status and to permit it to divide its orders for cars to and ship its coal via either or both roads as desired, while contemporaneously according these rights and privileges to the similarly-located and competing Coal Company mines, was not accidental, unforeseen or mere negligence on petitioners' part, but a continuous tort and violation

of statutory duty. In such cases, the courts have held that the mitigation-of-loss rule does not apply. *American Smelting & R. Co. v Riverside Dairy & S. Farm.* 236 Fed. 510, 514-15 (C. C. A. 8); *Wilson v Scarboro,* 88 S. E. 872, 873; *Borden v Carolina Power Co.,* 93 S. E. 442, 443; *Heaney v Heeney,* 2 Denio (N. Y.) 625, 627; *Cardwell v Norfolk, etc. R. Co.,* 88 S. E. 495, 496; *Sutherland on Damages,* (4th Ed.) Vol. 1, p. 479.

For the foregoing reasons and those stated by the Circuit Court of Appeals (997-8), respondent contends that the Commission's action was erroneous as a matter of law.

(c) By multiplying the additional tonnage which the Commission found respondent would have produced if he had accepted the 20-80 offer (28-29) by the profit per ton (29) and totalling the results, a grand total of $34,-310.67 is secured. If this amount with interest is added to the amount of the reparation order with interest, a total of approximately $70,905.00 is secured, or more than sufficient to cover the judgment.

III

1. The assailed Acts and Practices of the Railroads presented questions administrative in character, consequently the Commission's finding that they were in violation of the Act and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining any action for damages.

2. The petition shows that the Commission decided these questions and prescribed the standard. Its action thereon is conclusive.

3. The promulgation of the Commission's finding and standard was delayed beyond the two-year period of limitation, thus making impossible any voluntary election of Section 9 remedies. Respondent was compelled to proceed before the Commission or not at all. A construction of Section 16 (2) that in such cases the injured shipper is limited in maximum recovery to the Commission's award would be unjust, and deprive the shipper of his statutory and property rights.

1. The questions were clearly administrative; i. e., they were of a character not initially cognizable in a court. The basic complaint was not that petitioners violated their rules applicable to one-road mines or their rules applicable to two-road mines. The basic complaint was against their discriminatory classification of respondent's mine as a one-road mine, contemporaneously with their classification of the similarly-located and competing Coal Company mines as two-road mines, for purposes of car distribution. Neither of the railroads could have been mandamused to put respondent's mine in their category of two-road mines, nor could respondent have successfully attacked the railroad's discriminatory classification of the respective mines or the discriminatory car distribution which resulted therefrom as an incident to an initial action for damages in court.

The basic question here was somewhat akin to that presented in *Director General v Viscose*, 254 U. S. 498, 503-4, where a shipper of silk secured an injunction restraining the Director General of Railroads from excluding silk from the category of commodities transported by railroads. He contended in this Court that "there was no administrative question" and that the "thing presents a question of law for the courts" (arguments of counsel, 65 Law Ed. 373-4). But this Court held that "exclusion in this case was an attempted classification * * * within the exclusive initial jurisdiction of the Commission."

In its final analysis, the question here was one concerning car distribution. It was somewhat similar to that presented in *United States v New River Co.*, 265 U. S. 523, 541-2, where joint mines (made so by means of a trackage agreement, 62 I. C. C. 269, 272-3) attacked an order of the Commission limiting such mines to 100 percent of their ratings when ordering cars from both roads serving them. They insisted before the Commission that they had a legal right to order 100 percent of their ratings from each road (62 I. C. C. p. 273); and in this Court, that they had a "legal right to a fair share of the

car supply of each carrier". But this Court held that "the Commission's jurisdiction over the subject is exclusive".

See also *Baltimore & O. R. Co. v United States ex rel Pitcairn Coal Co.*, 215 U. S. 481, 486-7, 493; *Morrisdale Coal Co. v. P. R. Co.*, 230 U. S. 304, 313.

As the questions were administrative, the Commission's finding thereon and its prescription of the standard that should have prevailed were necessary prerequisites to maintaining a suit for damages. *Morrisdale Coal Co. v P. R. Co., supra.*

2. Respondent's petition in the District Court shows that he complied with the foregoing requirement, secured the Commission's finding that the acts and practices of the railroads were unduly prejudicial and the prescription of its standard that respondent should have been permitted to divide his orders for cars to the respective carriers in such divisions of 100 percent of the rating of his mine as his judgment dictated and that cars should have been accordingly furnished in conformity with the available supply on the respective roads. Both finding and standard are conclusive on the Courts. *Mitchell Coal & C. Co. v P. R. Co.*, 230 U. S. 247, 258.

But petitioners, first considering the reports attached as exhibits to the petiton as not parts thereof, attack the petition because it does not state "how or why the Commission reached that conclusion" (brief p. 42). It was not necessary. The statement of the causes for which respondent claimed damages set out in the petition clearly disclosed the administrative character of the questions presented to the Commission. With respect to such questions, "This Court has no concern with the correctness of the Commission's reasoning, or with the soundness of its conclusions." *Virginian R. Co. v United States*, 272 U. S. 658, 665-6.

Then considering the reports as parts of the petition, and conceding for the moment that the complaint to the Commission raised an administrative question, petition-

ers contend that the Commission "did not decide the case on that basis" (brief p. 46). Reference is made to the statement in the Commission's report that "it is not necessary * * * to determine whether or not the *Coal Company* was entitled to order its cars in conformity with *existing* car service rules for joint mines and as to that we express no opinion" (15). The report discloses the reason. During a portion of the period, one of the rules permitted a mine served by two railroads to order 75 percent of its rating from each railroad, for 150 percent from both. This rule was condemned by the Commission in a case decided December 11, 1922, and a new rule promulgated which permitted such a mine to order a maximum of only 100 percent of its rating from both roads (14-15). The Commission decided to make this new rule the basis of the standard that should have prevailed at respondent's mine and hence did not consider it necessary to decide whether the Coal Company mines were entitled to order their cars in conformity with the old rule. But the fact that the Commission decides an administrative question one way rather than another, or prescribes one standard rather than another, does not render the question presented any the less administrative. "This Court has no concern with the correctness of the Commission's reasoning".

Petitioners also urge that the Commission did not decide that either the Coal Company or respondent was entitled to a joint mine status (brief p. 50). The service status enjoyed by the Coal Company mines and that prescribed as the standard that should have prevailed at respondent's mine was a joint-mine or two railroad-mine status. In *United States v New River Co.*, 265 U. S. 523, 542, it was said—

> "An operator of a joint mine is not confined to any one carrier serving it. It may order from each carrier; but the total number of cars ordered may not exceed the gross daily rating of the mine. It may select the carrier which, at the time, has the bet-

ter car supply, and receive its pro rata share of that supply according to its gross daily rating, based on its capacity to ship by all carriers. It may choose between the carriers to secure the service, connections, and markets it desires to have."

Petitioners then urge that respondent suffered no *undue* prejudice because the purpose of the trackage agreement was the fuel contract between the Western Maryland and the Coal Company and that respondent had no such contract; and in fact that he suffered no prejudice at all because "an allotment of cars" of equal percentages, as made to the Coal Company was made to respondent (brief pp. 24, 50-1). While the Commission's finding that respondent was subjected to undue prejudice is conclusive on this Court (*Mitchell Coal & C. Co. v P. R. Co., supra*), the contentions are baseless as well as untenable. The purpose of the trackage contract is "not of legal significance" (*Virginian R. Co. v. United States,* 272 U. S. 658, 664), but the fact is, and the Commission's report discloses, that the whole scheme was framed up and put through by and for the benefit of the Coal Company, and that the Coal Company then used it to get the Western Maryland fuel contract (16, 17, 18, 19-20); indeed, when respondent complained to the president of the Western Maryland, he was told to see the president of the Coal Company (17).

In regard to the statement that cars were allotted to the Coal Company on the 20-80 basis, the report shows that while the Commission found that those mines were only permitted to ORDER cars on that basis, it did not find that they were only permitted to RECEIVE cars on that basis. On the contrary, its report states that "there was much testimony that the mines of the Coal Company were operating practically *at capacity* during this period", i. e., practically at 100 percent (18). As the period was one of "severe shortage of cars" (22), it follows that the Coal Company mines actually RECEIVED a much larger supply of cars than they were entitled

to receive on the 20-80 basis, or even on the basis of 100 percent orders to the Western Maryland, as the largest supply which that road had available for *general* distribution during any month of the period was 69 percent (23). And neither report of the Commission contains any finding or statement that respondent was offered CARS on the 20-80 basis or rejected any CARS on that or any other basis. As for the paper 20-80 offer, neither report discloses whence it came or how it was presented, but the first report indicates that it was not concurred in by the Western Maryland, the road whose service respondent was endeavoring to secure (17, 18, 20).

In any event the Coal Company mines, being reached by both roads and having rates in effect therefrom via both roads, had an enforceable legal right to order their cars and ship their coal as they saw fit, and they exercised the right throughout the period (17-18). In *Bell & Zoller Coal Co. v B. & O. S. W. R. Co.*, 74 I. C. C. 433, 439, cited in the Commission's report herein (14), the Commission said—

> "Whenever the joint mine orders cars from the different carriers serving it (rather than from the carrier with the larger supply), it is doubtless due to other compensating advantages which outweigh those of a temporary greater car supply *and such election is the voluntary choice of the shipper.*"

3. The petition shows that although respondent filed his complaint with the Commission in October, 1923, or only a few months after the close of the period involved, the Commission did not finally decide the administrative questions until May 10, 1926 (5, 10). As the statute fixes a limitation of two years within which to institute a proceeding for damages, respondent was not able to make a voluntary election of Section 9 remedies; he was compelled by the Commission's delay to proceed before that body for damages, or not at all. He proceeded before the Commission, secured a reparation order which

petitioners elected to refuse to pay, filed his Section 16 suit thereon, and recovered judgment for an amount which, although greater than the Commission's award, was less than that body's computation of his damages.

A construction of Section 16 that in such cases the injured shipper is limited in maximum amount to the Commission's reparation order, even though the amount of the order was arrived at by the use of an erroneous formula or as the result of incorrect mathematical computations, would be flagrantly unjust and unfair. If such be the law the socalled election of remedies is a sham and delusion for, by the Commission's delays or the carriers' dilatory tactics in prolonging the case before the Commission, the injured shipper can be easily deprived of his supposed rights in that regard.

This Court has held that it is "bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute". *Knowlton v Moore*, 178 U. S. 42, 77. By the plain language of the Act, the more reasonable interpretation of the Circuit Court of Appeals herein is abundantly present in Section 16.

IV

The questions whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's award are res judicata, having been determined by the decree in Brady v Interstate Commerce Commission, 43 Fed.(2) 847, affirmed Brady v United States, 283 U. S. 804.

1. These questions were among those presented for determination in the equity proceeding above cited, which was instituted in the same District Court and at about the same time as was the instant action at law (5, 8). The bill of complaint attacked the deductions made by the Commission from the gross amount of respondent's damages. It was represented that unless they were set aside and annulled respondent would be sub-

jected to irreparable injury for which he had no plain, adequate and complete remedy at law. The court was asked to set aside and annul them, direct the Commission to make a supplemental order consistent with the decree of the court, and to grant such further relief, etc. The respondents moved to dismiss for lack of jurisdiction. (8, 105, 106; also 43 Fed. (2) pp. 848, 849).

The Court (Circuit Judges Parker and Northcott and District Judge Baker) decided the question or questions as follows (43 Fed. (2) p. 852)—

> "If the party in whose favor it (reparation order) is made is not satisfied with it, he may in instituting his suit set forth the cause of action for which he claims damages, and the order of the Commission, and have his case proceeded with "In all respects like other civil suits for damages" except that on the trial the findings and order of the Commission shall be *prima facie* evidence of facts therein contained. There is nothing in the Act, we think, which limits his recovery to the amount awarded by the Commission and there is no reason why the recovery should be so limited. The order and findings of the Commission are *prima facie* evidence, just as is the report of an auditor in an action at law. *Ex parte Peterson*, 253 U. S. 300. * * * It is apparent, therefore, that no irreparable injury is to be apprehended from reparation orders of the Commission, that any errors therein may be corrected in the trial provided for by statute, and that resort to injunction to set aside such orders is not permissible.
>
> "FOR THE REASONS STATED, we think that the Court is without jurisdiction to entertain the suit, and the bill will accordingly be dismissed."

The plaintiff (respondent here) in the law action was the complainant in the equity proceeding. The two defendants (petitioners here) in the law action were respondents in the equity proceeding, *having voluntarily*

intervened, submitted themselves to the jurisdiction of the Court, and participated by counsel in the hearing (43 Fed (2) p. 848).

2. Every element necessary to, and justifying the application of, *res judicata* is present. There is an identity of parties. There is an identity of *questions*, the *questions* common to both proceedings being whether respondent had a right of action for, and the District Court jurisdiction to grant recovery of, a greater amount than the Commission's reparation order. Those *questions* were actual issues in the equity proceeding. They were presented to a court of equity, so the initial *questions* which that court had to determine were those inherent in the proposition whether the first prerequisite to its jurisdiction as a court of equity was disclosed by the bill. They had to be settled *in limine*. As said by this Court in *Singer Sewing Mach. Co. v Benedict*, 229 U. S. 481, 484—

> In the courts of the United States it is a guiding rule of law that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares (citing statute), and the number of decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*.

See also *United States v Bitter Root Development Co.*, 200 U. S. 451, 472.

Any and every court of equity has inherent power to prevent irreparable injury, and hence inherent power to pass upon questions with respect thereto. Those questions were settled by the special court; it dismissed the bill for lack of jurisdiction "for the reasons stated" one of which was that "no irreparable injury is to be apprehended from reparation orders of the Commission, that

any errors therein may be corrected in the trial provided for by statute and that resort to injunction to set aside such orders is not permissible". And petitioners, having participated in the litigation, are bound by the decision, especially as it was subsequently affirmed by this Court.

In *United States v Moser*, 266 U. S. 236, 242, it was said—

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a sebsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question,* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Empasis by the Court).

3. Petitioners say (brief pp. 23, 48) *res judicata* was never pleaded by respondent. The two actions were carried on simultaneously in the same District court, the petition in the law action referred to the pendency of the equity proceeding, and the judgment in the first case finally determined was automatically decisive of the foregoing common questions in the case left remaining.

Furthermore, for aught the present record shows, the special court's decree was presented at the trial. *Campbell v Rankin*, 99 U. S. 261, 262; *Hornbuckle v Stafford*, 111 U. S. 389, 391.

Next they say (brief 23, 49) the stated conclusions of the court in respect of the jurisdictional question now being discussed were *obiter dicta*. They were not *obiter dicta*. The questions involved therein were distinct issues in the case, were within the general powers of the court to determine, and had to be determined; indeed, it

was the court's duty to determine them *sua sponte in limine*. And the court, "noticing the contention of plaintiff (respondent here) that he stood in danger of irreparable injury" (105), actually and conclusively determined them.

This Court gave no reasons for affirming the decree in the equity proceeding, but petitioners attempt (brief pp. 24, 48) to supply them by what they term the "proper interpretation" of the citations in the memorandum opinion. Their first evolved reason, towit, that "the Commission's order *minimizing* the recovery was negative as to the amount *disallowed*" is self-contradictory, and is in fact an admission of the perfectly-obvious truth that the Commission first found the amount of respondent's damages according to its previously-prescribed administrative standard and then by affirmative action in applying a rule outside the act "minimized" the amount to be awarded. Their second evolved reason, towit, "that there could be no review of the facts found by the Commission in respect of the administrative question" is immediately negatived by their subsequent statement that "the memorandum opinion does not show that this Court regarded an administrative question actually to have been present or decided by the Commission". And this Court's "omission" to cite *Meeker v Lehigh Valley R. Co.*, 236 U. S. 412 is explained by the fact that the special court twice referred to it and what it decided in respect to the meaning of the prima facie clause in Section 16 and hence this Court, in affirming the decree of that court, did not consider it necessary to repeat the citation a third time.

When it is remembered that the Section 16 phase of respondent's Section 9 suit praying judgment for $57,735.11 with interest was pending in the District Court at the time this Court affirmed the decree in the equity proceeding, the proper interpretation of this Court's memorandum opinion and the citations appended thereto seems clear. Respondent interpreted them as holding that the decree of the lower court was affirmed on the grounds stated by that court as the reasons for its deci-

sion and on the further grounds (a) that the suit in equity challenging the Commission's reparation order and asking for complete relief was tantamount to an attempt to start a second Section 9 suit and was therefore not permissible, and (b) that the Commission's order, while only prima facie correct insofar as it determined the fact and amount of respondent's damages (as held by the special court), must be regarded as conclusively correct insofar as it determined the administrative questions.

But whether this Court travelled the same route all the way or a different route part of the way is after all immaterial in the light of the important fact that it arrived at the same goal as did the special court. And when this Court reached that goal, it did not criticise the route which the special court had taken; it did not modify the decree of the special court in any particular. This Court affirmed the decree of the special court and thereby, it is respectfully submitted, sanctioned the result and effect of that court's determination of the foregoing questions upon the instant case.

When it is remembered that an entirely erroneous adjudication of a *fact, question* or *right* in one proceeding may not be disputed in a subsequent action between the same parties (*United States v Moser, supra*), there is certainly a world of room for the proposition that the special court's determination of the foregoing questions in the equity proceeding may not be disputed in the instant case.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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